

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition for
Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition for
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)

**ADMINISTRATIVE LAW JUDGE'S RULING
SETTING PREHEARING CONFERENCE
TO ADDRESS THE 90-DAY PHASE OF
FCC TRIENNIAL REVIEW ORDER**

I. Introduction

As noted by ruling dated July 30, 2003, a new phase of this rulemaking has been designated to conduct proceedings called for under the Federal Communications Commission (FCC) Triennial Review Order, released on August 21, 2003.¹

This ruling sets a prehearing conference (PHC) for Friday September 12, 2003 to address further measures to implement the requirements of the FCC Triennial Review Order that relate to the 90-day review phase of the proceeding. The 90-day phase specifically relates to the FCC's national finding

¹ CC Docket Nos. 01-339, 96-98, 98-147

that competitors are not impaired with respect to DS1 enterprise customers served using loops at the DS1 capacity and above. The FCC Order allows for a state commission to rebut the national finding of no impairment by undertaking a more granular analysis of on a market-specific basis applying prescribed economic and operational criteria.

This ruling and the scheduled PHC only address procedural issues relating to the 90-day phase of the proceeding, but do not address the separate 9-month review phase called for under the FCC Order. This ruling also makes determinations concerning the procedural approaches and guidelines that will apply to this phase of the proceeding.

II. Necessity to Proceed with the 90-day Review Phase

A round of opening and reply comments have been filed by parties concerning their interests the 90-day phase of this proceeding, and proposals as to the process for going forward. The 90-day review phase only needs to be completed to the extent that there are parties that actively intend to put forward a showing of impairment in accordance with criteria and limitations imposed by the FCC Order. Within the 90 day allotted period, the Commission must conduct proceedings, render a decision, and (assuming the Commission affirmatively finds impairment exists) file a petition rebutting the FCC finding of no impairment. In the event this Commission finds that impairment exists, the Commission decision will form the principal basis for the petition filed with the FCC.

Given the very short time frame allotted by the FCC for this phase, therefore, any party that intends to put forward a showing of impairment must very promptly make that assessment and communicate its intentions to the Commission and other parties. Otherwise, the proceeding cannot be completed

within the allotted 90 days. Accordingly, on the premise that one or more parties will affirmatively express intent to make a showing of impairment, a preliminary schedule is tentatively set for completing the 90-day proceeding, as set forth below.

A PHC is hereby scheduled for Friday September 12, 2003, at 10 a.m. to address procedural process and scheduling matters for the 90-day phase of the proceeding, as discussed further below. This PHC shall not address the 9-month phase that shall be dealt with at a later date.

III. Issues to be Addressed at the PHC

A. Identification of Active Parties

At the PHC, any parties intending to put forth a showing of impairment under the 90-day phase of the proceeding shall be expected to identify themselves. In the event that it is determined that there are parties intending to make a showing of impairment under the 90-day schedule, a procedural schedule will be finalized. After a schedule is finalized, no additional schedule delays will be permitted to accommodate any late-comers to the proceeding that failed to identify their intent at the PHC. The PHC will provide the opportunity for parties to discuss necessary discovery procedures, as elaborated below, and other scheduling and process issues relating to this phase.

B. Discovery

A critical element in the success of any efforts to put on a showing of impairment will be an effective process for discovery among interested parties. In their comments, various parties have offered suggestions and proposals concerning how the process of discovery should proceed.

1. Burden of Proof Versus of Production

As noted in the ALJ ruling dated July 30, 2003, the burden of proof in this phase is upon those parties that assert impairment exists. Yet, to support

such assertions, parties require timely and cooperative discovery of relevant data, some of which may be in the possession of opposing interests.

Accordingly, those parties in possession of such relevant discoverable data have the burden of production. Parties in possession of such data shall not be permitted to withhold production of said data based on arguments that impairment claims must be made first. On the other hand, requests for data must be submitted on a timely basis if parties expect a timely response.

2. Role of Commission in the Discovery Process and Confidentiality Issues

Another issue raised by parties concerns the process for protection of confidential data balanced against the need for access to relevant data to support impairment showings. In view of concerns over discovery disputes relating to confidentiality, certain parties (*e.g.*, Verizon) suggest that the Commission staff take on the role of issuing its own data requests and developing its own repository for compiling data responses. Verizon presumes that competitive carriers will be more willing to release relevant data concerning specific business operations to the Commission staff as opposed to competitors.

Yet, the proper remedy for dealing with confidentiality of data is the use of nondisclosure agreements and appropriately restricted access to confidential data among interested parties. The Commission has previously developed and used templates for nondisclosure agreements, such as the one that has been used in the OANAD proceeding (R.93-04-003). Parties are directed to work toward development of a nondisclosure agreement template that can be used in this phase of the proceeding to permit discovery of data involving confidential information subject to appropriate nondisclosure protections. The nondisclosure agreement previously developed in the OANAD proceeding should serve as a useful guide for an acceptable nondisclosure agreement here.

Parties will be expected to report to the ALJ at the PHC concerning progress made toward finalization of a mutually acceptable nondisclosure agreement, and any remaining confidentiality issues that need to be resolved.

The identification of discovery needs and the exchange of discovery is part of the advocacy process. The Commission is a fact finder and adjudicator, not an advocate. It is the responsibility of parties to decide what discovery they need to support their case, and to seek to resolve discovery disputes. It is the responsibility of the parties to be custodians of data exchanged through discovery.

The Commission staff thus shall not perform the role of primary data gatherer or custodian. The Commission enters into the data gathering process, as necessary, primarily to resolve discovery disputes and ultimately to rule on admissibility of evidence received into the formal record. Parties that cannot resolve discovery disputes among themselves after meeting and conferring should promptly file discovery motions, as appropriate. The Law and Motion Judge in cooperation with the Case Judge shall act to promptly resolve such motions. The Commission, or ALJ acting on its behalf, may also at its own discretion direct the production of certain information to the extent deemed necessary to complete the record, and where not otherwise provided by parties. Ultimately, however, the primary responsibility for conducting discovery remains with the parties.

3. Consolidation and Sharing of Discovery Among Parties

Parties are encouraged to coordinate discovery requests, and to distill potentially duplicate requests into a single set of common questions where feasible. SBC Pacific's proposal shall not be adopted, however, to restrict parties' discovery only to joint discovery requests. Parties should seek to decide among

themselves where they have common discovery requests versus where party-specific questions are involved. An individual party shall be permitted to issue its own discovery questions where it has interests and questions that diverge from the common questions posed by the group of parties conducting discovery in a particular area.

In the attachment to its September 3, 2003 reply comments, Verizon has suggested certain generic questions that it believes may serve as a basis for developing a common data request template. Parties should examine Verizon's suggested question format with a view either to agreement with it, or suggested revisions to it. At the PHC, parties will have an opportunity to discuss the Verizon question format and the general process for development of a common set of data requests. As necessary, time may be allotted after adjournment of the PHC for parties to continue informally discussing coordination and facilitation of discovery requirements.

In the interests of economy, parties should also seek agreement on a common distribution list for receiving copies of data requests and/or responses thereto. Even if a party has asked a question that is not part of the collective common data request, other parties may be interested in the question or response, and should have access to such information. The Commission's Telecommunications Division should be copied on data requests and responses that are distributed.

C. Evidentiary Hearings and Order of Presentation

Assuming that at least some parties intent to make a showing of impairment under the 90-day phase, evidentiary hearings will be required, given the fact-finding nature of this proceeding. Evidentiary hearings shall be tentatively scheduled pursuant to the preliminary schedule set forth below.

Parties disagree concerning the sequencing of testimony and order of going forward with evidentiary showings. Verizon proposes that parties seeking to make a showing of impairment be required to make an initial prima facie showing in order to survive a motion to dismiss at a preliminary stage of the 90-day proceeding. Under Verizon's approach, the Commission would rule on any motions to dismiss at this preliminary stage before authorizing additional testimony to be served by those parties supporting the FCC's finding of no impairment. Other parties oppose Verizon's approach for a two-tiered phasing of testimony, arguing that it would be too time consuming and would be prejudicial to parties that had to make their showing twice.

Given the very limited time for this phase of the proceeding, there will be no separately designated preliminary prima facie phase, as proposed by Verizon. Under Verizon's approach, parties would be waiting for a separate ruling as to the sufficiency of parties' opening testimony before proceeding with reply testimony. Such a process would unduly slow down the proceeding with additional procedural layers, rather than streamlining it. Parties with opposing interests can offer reply testimony as evidence to refute showings put on by parties claiming impairment. Moreover, if any party believes that any testimony is deficient in meeting the evidentiary requirements prescribed by the FCC Order, or includes material that is not relevant or outside the scope of the designated framework of the FCC Order, a motion to strike may be filed.

Parties with any witness scheduling constraints should advise the ALJ as early as possible, but in any event, no later than the date for mailing of opening testimony. Given the limited timeframe, witnesses must be made available sometime during the scheduled week of hearings. Requested witness

schedule order will be accommodated to the extent possible on a first-come, first served basis.

**D. Schedule Required to Complete
the Proceeding within Allotted Time**

The following preliminary schedule is hereby tentatively set, given the time required to meet the 90-day constraint imposed by the FCC Order. Certain events, such as the time from the Proposed Decision to Final Decision are constrained by statutory requirements. Pub. Util. Code Section 311(g) requires a minimum 30-day review and comment period prior to voting on any Commission decision. The 30-day period may be reduced or waived in “an unforeseen emergency situation” or upon stipulation of all parties to the proceeding. The prospects for reducing the 30-day comment period will be subject to discussion at the PHC. The specific duration and due dates for events may be subject to revision based upon any input received at the September 12, 2003 PHC. The tentative schedule is as follows:

90-day Schedule for Triennial Review Order

Event	Date
ALJ Ruling	5-Sep
PHC	12-Sep
Opening Testimony	22-Sep
Reply Testimony	29-Sep
Evidentiary. Hearings Begin	6-Oct
Evidentiary Hearings End	10-Oct
Opening Briefs	20-Oct
Reply Briefs	27-Oct
Proposed Decision	18-Nov
CPUC Full Panel Hearing	3-Dec
Comments on PD	8-Dec
Reply Comments	13-Dec
Final CPUC Decision	18-Dec
FCC Petition Filed	30-Dec

IT IS RULED that:

1. A preliminary schedule for purposes of completing the 90-day phase of this proceeding, pursuant to FCC directives is tentatively adopted, as set forth above. The schedule may be subject to revision based upon any input received at the PHC, as scheduled below.

2. A prehearing conference is hereby scheduled for Friday September 12, 2003, at 10:00 a.m. at the Commission courtroom at 505 Van Ness Avenue, San Francisco, California, to address necessary procedural planning with respect to the 90-day phase of this proceeding.

3. Evidentiary hearings for this phase are hereby tentatively scheduled for October 6-10, 2003 at the Commission courtroom at 505 Van Ness Avenue, San Francisco, California.

4. The procedures as outlined above are hereby adopted with respect to discovery, testimony, and rights and obligations of parties relating to implementation of the 90-day phase of this proceeding.

Dated September 5, 2003, at San Francisco, California.

/s/ Thomas R. Pulsifer
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Setting Prehearing Conference to Address the 90-day Phase of FCC Triennial Review Order on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated September 5, 2003, at San Francisco, California.

/s/ Antonina V. Swansen
Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, *e.g.*, sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.